In the Supreme Court of the United States

OCTOBER TERM, 1973

Supreme Court, U.S.
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MICHAEL RODAK, JR.

No. 73-640

DWIGHT GEDULDIG,

Appellant,

v.

CAROLYN AIELLO, individually and on behalf of all others similarly situated,

Appellees.

DWIGHT GEDULDIG,

Appellant,

v.

AUGUSTINA D. ARMENDARIZ, ELIZABETH B. JOHNSON, JACQUELINE JARAMILLO, individually and on behalf of all other women similarly situated,

Appellees.

CONSOLIDATED CASES ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Reply Brief for Appellant

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Appellees argue that pregnancy is the *essence* of femaleness.[1] Therefore, unless pregnancy is compensated as a

1. Appellees Brief at 32, n. 25: "The physical characteristic which is most pervasively used to differentiate the legal status of men and women is the capacity of women to become pregnant."

temporary disability, California is guilty of sex discrimination and pregnant women are denied equal protection of the laws. In light of recent litigation in this area, this Court may well have a sense that motherhood involves neither a pedestal nor a cage but a Procrustean bed upon which pregnancy is alternately not a disabling condition,[2] and a frequently fatal affliction.[3]

Appellees do a disservice to women when they make pregnancy the *sine qua non* of being woman. Surely it is common observation that a large part of woman's struggle for equality involves gaining social acceptance for roles alternative to childbearing and childrearing, and to place on equal footing the woman who, through choice or chance, is childless. Childbearing capacity is not an essential or universal or lifelong female trait. But it is a common occurrence among women of childbearing age and it is the subject of statutory regulation in a variety of contexts. In light of the flood of litigation generated by these laws,[4] it is appropriate for this Court to reiterate its conclusion in *Cleveland Board of Education v. LaFleur*,[5] that in challenges to pregnancy regulations, the judicial process necessarily proceeds from an analysis of the rational relationship of the rule to a valid state interest.

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2. Brief for Petitioner on Writ of Certiorari in *Cohen v. Chesterfield County School Board*, No. 72-1129 (January 21, 1974), 19, especially footnote 10.

3. Appellees' Brief at 62-64; Brief Amicus Curiae of International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC ("IUE" hereinafter) at 48-49.

4. See Appellees' Brief at 29, n. 22 for a listing of some of these cases.

5. Decided together with *Cohen v. Chesterfield County School Board*, ... U.S. ....., 94 S.Ct. 791, 798 (1974) (hereinafter cited as *La Fleur*).

I.

THE EXCLUSION OF BENEFITS FOR NORMAL PREGNANCY UNDER THE CALIFORNIA UNEMPLOYMENT INSURANCE CODE IS THE RESULT OF A CONSCIOUS LEGISLATIVE DETERMINATION

Throughout their brief, Appellees consistently recast the legislative purpose behind the California Unemployment Insurance Code ("UIC" hereinafter) in terms less inconsistent with the coverage of normal pregnancy. Thus, Appellees profess an ability to discern a "basic intent"[6] of the UIC and also to determine what the legislature "most desired."[7] Based on these constructs of legislative purpose, they imply that benefits for child bearing were omitted more through oversight than design.[8]

Of course the legislative might have fashioned a plan which provided wage continuation benefits for workers absent from work for any reason. Surely many of such individuals *need* substitute income notwithstanding their absence from work is not caused by any disability. This would also include individuals whose absence from work is for socially desirable reasons, *e.g.*, pursuing education, or caring for a sick relative. Simply stated, however, the State did not devise such an all-encompassing plan. The legislative intent behind the UIC was more specific.

There is no doubt that the legislature intended to exclude benefits for normal pregnancy. Indeed, the exclusion of pregnancy benefits was essential to the legislative purpose of establishing a broad illness and injury disability program within the resources generated by an existing one

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6. Appellees' Brief at 8-9.
7. Appellees' Brief at 57.
8. Appellees' Brief at 57, n. 74.

percent employee contribution. This is manifest from the legislative history and authoritative interpretations by the California courts previously discussed.[9] If any doubt remained as to the legislative purpose, it was dispelled by the legislature's action in 1973, when it extended disability benefits to "abnormal and involuntary complications of pregnancy," but continued the exclusion of benefits for normal pregnancy. California Stats. 1973, c. 1026.

Thus, the present case requires neither a search for an unexpressed legislative rationale,[10] nor a determination of whether the relationship between the legislative intent and the terms of the statute fulfills the legislative objective.[11] The sole question before this Court is whether it is constitutionally permissible for a state to establish a benefit program for illness and injury disabilities, without at the same time providing benefits for normal pregnancy.

II.

THE UIC DOES NOT DISCRIMINATE ON THE BASIS OF SEX IN EITHER ITS PURPOSE OR EFFECT

A. The Operation of the UIC

By attempting to fix the present question in a matrix of injustices suffered by women,[12] Appellees imply that the exclusion of benefits for normal pregnancy was the result of an intent to discriminate against women. Of course, the record in this case and the history of the legislation are

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9. Appellant's Brief at 10-14.

10. Ex parte Collett, 337 U.S. 55, 58 (1949): "[T]here is no need to resort to the legislative history where the statutory language is clear."

11. *Compare Cleveland Board of Education v. LaFleur*, *supra*, 94 S.Ct. 791.

12. Appellees' Brief at 28-46; Brief Amicus Curiae of IEU at 34.

devoid of any such evidence. If this had been its purpose, the legislature chose an exceedingly poor vehicle when it enacted the UIC: Appellees nowhere challenged the indisputable fact that *women receive a disproportionate advantage in benefits paid under the UIC, even with benefits for pregnancy excluded.* Thus, women presently receive 38% of all benefits while contributing only 28% of the plan's income.

Appellees suggest that this advantage in benefits is an unintentional consequence of the benefit structure of the program which results in higher benefits-to-contributions ratios for workers with lower incomes. However, the cost of benefits is a function of duration and frequency as well as amount of benefit. Appellees admit that the *duration* of paid claims is higher for men than for women. In 1971 women claimed 44.1% of the total weeks compensated, while men claimed 55.9%.[13] Thus women claimed a significantly larger percentage of the total weeks compensated than their representation in the work force would warrant. Appellees also admit that women have 'a slightly greater" frequency rate.[14] In fact, the frequency of claim filing among women is *dramatically* higher. In 1971 the claim frequency rate for women was 25% higher than for men. Women of childbearing age (under age 40) file claims at a 27% greater rate than men under age 40 do. Most significantly, women under age 40 earning $10,000 or more per year file claims at a rate nearly 48% greater than their male counterparts.[15]

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13. Human Resources Development Department Publication No. 1031A, May 22, 1972, Table 4, Col. 2, Basic Benefits.

14. Appellees' Brief at 82 n. 105.

15. Human Resources Development Department, "1971 Claim Rate State Unemployment Disability Insurance Plan: Number of Claims Filed Per Thousand Covered Workers, by Annual Earnings, Sex and Age." See Appendix A for complete table.

Despite Appellees' protestations to the contrary,[16] it is undeniably more costly to provide disability insurance for women than for men. Appellant's main brief quoted the testimony before the Joint Economic Committee of Congress at hearings on the "Economic Problems of Women," of Herbert S. Denenberg, Commissioner of Insurance for the State of Pennsylvania, in which he acknowledged that disability coverage poses the most difficult rate problem because loss experience of women *even with pregnancy excluded* may run two and a half times higher than costs for men.[17]

Appellees also misapprehend the significance of the present distribution of benefits between men and women. The State has never contended that, apart from the basic qualifying requirements, it limits benefits according to contributions. However, it does contend the female benefit advantage demonstrates that the UIC does not operate to discriminate on the basis of sex. Since female workers presently receive a greater share of UIC benefits than males, they receive more than a fair return for their contributions.

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16. Appellees' Brief at 82.

17. Report of Proceedings, Vol. 2 at 198 (July 12, 1973), previously quoted in Appellant's Brief at 27, n. 38.

When questioned by Congresswoman Griffiths regarding his reliance on insurance industry data, the following colloquy occurred:

> Mr. Denenberg. Let me assure you that I will be the last to rush to the defense of the industry.
>
> Mrs. Griffiths. I know you will.
>
> Mr. Denenberg. And also let me assure you I will be the last to believe the insurance industry if I have any suspicions, but I do think it is clear that their statistics are valid. . . .

Report of Proceedings, Vol. 3, at 230.

To the same effect see, Brief for General Electric Company, as amicus curiae at 24; Brief for the American Telephone & Telegraph Company as amicus curiae at 8-9.

It is against this background of substantial benefit advantage to female workers that Appellees' demand for the creation of a new class of beneficiaries to be composed entirely of women must be judged.

B. The Standard of Review

Appellees apparently recognize that the facts of the UIC's operation will not support a finding of sex discrimination under traditional equal protection standards. Therefore, they devote a substantial portion of their argument to the formulation of an extraordinary standard of review in order to bolster their claim of discrimination.[18] This proposed standard has two essential elements: (1) classifications based on sex are inherently suspect and are subject to strict scrutiny; and (2) classifications based on characteristics unique to one sex are subject to the same standard. Neither of these positions is supported by the decisions of this Court.

Appellees themselves recognize that there is no foundation for the first proposition necessary to their "strict scrutiny" argument.[19] *See Frontiero v. Richardson,* 411 U.S. 677 (1973); *Reed v. Reed,* 404 U.S. 71 (1971). Nevertheless, they would expand this nonexisting first principle to require strict scrutiny of classifications drawn with reference, not to sex, but rather to a characteristic unique to one sex. As the State noted in its main brief,[20] this second contention not only goes beyond existing law, but beyond the intended effect of the proposed Equal Rights Amendment.

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18. Appellees' Brief at 28-54.

19. "Appellees believe that the time is right for a decision that sex-based classifications should be held to be suspect and subject to strict judicial scrutiny." Appellees' Brief at 52.

20. Appellant's Brief at 22-24.

Although Appellees find support in a law review article,[21] their position is directly contrary to the legislative history of the proposed amendment.[22] Moreover, the illustration contained in that article—the need for strict scrutiny with reference to a government policy prohibiting the employment of women in certain jobs because they may require periods away from work due to pregnancy—is at odds with this Court's decision in *La Fleur*. There the Court approved a school board policy conditioning re-employment following maternity leave on medical certification that the teacher was fit and her assurance that care of the child would not interfere with her duties as reasonable requirements furthering legitimate State interests.[23]

Neither is there any merit in Appellees' contention that the present case is subject to strict scrutiny because it involves intrusion by the state into the private decision as

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21. Brown, Emerson, Falk and Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 Yale L. J. 871, 894 (1971), cited in Appellees' Brief at 43-44.

22. The Senate report on the ERA states:

> "[T]he original resolution would not prohibit *reasonable* classifications based on characteristics that are unique to one sex." S.Rep. No. 92-689, p. 12 (emphasis added).

The Senate's endorsement of "reasonable" classifications is clearly more consistent with the standard applied by this Court in *Reed v. Reed, supra*, than with Appellees' requirement that any such classification be justified by a compelling state interest.

There is nothing in the debates to suggest that the Yale article's interpretation of "reasonableness" was what Congress had in mind. Indeed, Sen. Bayh remarked, in the course of a colloquy with Sen. Ervin:

> "If the Senator will read the full context of the RECORD at the time I introduced the discussion (on the Yale article) to which he refers, he will see that I said that I did not agree with all the aspects discussed, or all the points and positions taken in the article." 118 Cong. Rec. 4250 (daily ed., March 20, 1972).

23. *Cleveland Board of Education v. La Fleur, supra*, 94 S.Ct. at 799.

to whether to bear a child. By determining the proper allocation of limited resources within a nondiscriminatory state economic welfare program, the state can, in no sense, be said to have burdened the right to bear children. *La Fleur, supra,* 94 S. Ct. at 802, (Powell, J. concurring); *Dandridge v. Williams,* 397 U.S. 471 (1970).[24] A pregnant worker in California, far from being disadvantaged, is in a substantially better position than a comparable worker in any of the forty-five states which maintain no disability program at all.[25] In *Johnson v. Robinson,* 42 U.S.L.W. 4313 (March 4, 1974), the Court recently rejected the claim of a conscientious objector who had performed required alternative civilian service that the refusal to afford him the educational benefits available to veterans of military service violated the equal protection concepts of the fifth amendment and infringed his first amendment right to freedom of religion. The Court concluded that, "The withholding of educational benefits involves only an incidental burden upon Appellee's free exercise of religion—if, indeed, any burden exists at all." 42 U.S.L.W. at 4320.

In refusing to adopt a "strict scrutiny' 'test, the Court in *Johnson* noted that Congress was under no obligation to create an exception from military service for conscientious objectors, and that it would be inappropriate to judge the terms of such a liberal measure under so onerous a standard. 42 U.S.L.W. 4317 n. 14. Similarly, in *San Antonio*

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24. See discussion in Appellant's Brief at 28-29.

25. A California worker is entitled to benefits for any illness and injury disability, as well as any disability resulting from an abnormal or complicated pregnancy. This is not to say that the UIC is outside the limitations of the equal protection requirements of the fourteenth amendment, but where, as here, the classification does not impinge on a protected constitutional right, it is to be judged by traditional standards. *See* San Antonio Independent School District v. Rodriguez, 93 S.Ct. 1287 (1973).

Independent School District v. Rodriguez, 93 S. Ct. 1287, 1300 (1973), the Court held that the Texas system of school finance, "should be scrutinized under judicial principles sensitive to the nature of the State's efforts and to the rights reserved to the States under the Constitution," where the program was viewed as "affirmative and reformatory." Certainly, the State of California was under no obligation to establish the UIC, which is a liberal program for the benefit of its working population. As demonstrated above, the UIC is especially liberal in its distribution of actual benefits to female workers.

This Court has repeatedly recognized that, because of the complex practical problems faced by states in resolving conflicting demands for limited state resources, it is particularly inappropriate to apply rigid standards of review to classifications made within social welfare programs. *Rodriguez, supra; Jefferson v. Hackney*, 406 U.S. 535 (1972); *Dandridge v. Williams*, 397 U.S. 471 (1970). In *Dandridge*, the Court stated that, "[The rational basis test] is the standard that is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic policy." 397 U.S. at 485-486.

There is no logical distinction between the claim advanced by Appellees that the UIC discriminates by excluding benefits which would inure exclusively to one sex, and a claim that any state program discriminates when an exclusion from benefits disproportionately disadvantages one sex or the other.[26] It is difficult to conceive of any state program which could withstand such a test. Certainly, under

26. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), where the Court in a Title VII case held that an employer was required to justify an employment practice on grounds comparable to the compelling state interest requirement, where the practice was found to have had disparate impact on a group protected by Title VII.

Appellees' theory no legislature could even enact a benefit program without the possibility of an open-ended commitment of state resources due to unforeseen categories of beneficiaries, which, if composed predominately of one sex or the other, could claim constitutional entitlement. However, this Court has specifically rejected such a result. In *Jefferson v. Hackney, supra,* the Court denied a constitutional challenge to the different limits placed by the State of Texas on welfare grant categories. The Court stated:

> [G]iven the heterogeneity of the Nation's population, it would only be an infrequent coincidence that the racial composition of each grant class was identical to that of the others. The acceptance of appellants' constitutional theory would render suspect each difference in treatment among the grant classes, however otherwise lacking in racial motivation and however otherwise rational the treatment might be. Few legislative efforts to deal with the difficult problems posed by current welfare programs could survive such scrutiny, and we do not find it required by the Fourteenth Amendment. 406 U.S. at 548-549.

III.

THE DESIGN AND SCOPE OF THE UIC DO NOT REQUIRE INCLUSION OF BENEFITS FOR NORMAL PREGNANCY

Appellees assert that California's decision to exclude benefits for normal pregnancy is constitutionally impermissible because the UIC covers a number of conditions, *some* of which share *some* of the characteristics of pregnancy. For example, Appellees assert that the coverage of "cosmetic surgery" manifests sex discrimination since this is also a "voluntary" disability. Certainly any comparison of pregnancy and cosmetic surgery ends with voluntariness. Truly voluntary cosmetic surgery[27] repre-

27. Excluding *restorative* surgery which is part of the treatment of an illness or injury.

sents a miniscule portion of the claims filed under the UIC, approximately 0.12% of all disability claims filed, according to a survey by Appellant.[28] Moreover of these claims, 85.5% were filed by women. Neither have "sex change" operations placed a substantial demand upon the fund's resources.

In addition, Appellees cite conditions which are unique to, or allegedly predominant in, males, *e.g.*, hemophilia, prostatectomies, and hernias. However, Appellees overlook conditions unique to females which are also included, *e.g.*, breast and uterine cancer and removal of ovarian cysts. Appellees also ignore an overriding quantitative difference between pregnancy and all of the sex-unique or "voluntary" conditions cited in Appellees' Brief. None of these conditions, or all of them taken together, could ever statistically approach the number or extent of pregnancy-related claims, or the impact of such claims on the UIC.

In *Johnson v. Robinson*, ... U.S. ....., 42 U.S.L.W. 4313 (March 4, 1974), this Court rejected the contention that failure to provide educational benefits under the Veterans' Readjustment Act of 1966 to a conscientious objector who performed alternate civilian service constituted a violation of the Fifth Amendment's guarantee of equal protection. The district court sustained this claim because both military veterans and conscientious objectors have their economic and educational goals and careers interrupted as a result of Selective Service provisions. This Court reversed, stating:

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28. Because of the repeated references to cosmetic surgery by Appellees in this case, Appellant ordered all claims offices to segregate and record claims submitted for cosmetic surgery during a three month period from November 12, 1973 through February 15, 1974. Claims for cosmetic surgery were 221 out of a total of 189,140 claims filed; 32 were submitted by men, 189 by women.

> But this finding of similarity ignores that a common characteristic shared by beneficiaries and nonbeneficiaries alike, is not sufficient to invalidate a statute when other characteristics peculiar to only one group rationally explain the statute's discriminatory treatment of the two groups. 42 U.S.L.W. at 4318.

As discussed in detail in Appellant's brief,[29] pregnancy and the absences from work associated with pregnancy are dissimilar in significant respects from illness and injuries and the absences from work associated with those conditions. Pregnancy is neither an illness nor an injury but is a normal biological function. To a considerably greater extent than illness or injury, it is voluntary and subject to planning. It generally prompts a request for leave which extends beyond the period of inability to work, and which is in significant part determined by the welfare of the child rather than the mother.[30] Pregnancy and childbirth, unlike illness and injury, often result in a decision to leave the work force. Finally, pregnancy has a frequency and duration rate which dwarfs any other condition covered by the UIC. The State of California contends that this *combination* of factors causes pregnancy to be substantially different from illness and injury for disability benefit purposes so that workers who are pregnant and those who are disabled due to illness and injury are not "similarly circumstanced." *Reed v. Reed, supra,* at 75-76.

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29. Appellant's Brief at 16-24.

30. Contrary to Appellees' characterization, California does not contend that doctors and pregnant workers will collude to "defraud" the State. It does expect that doctors, rightly concerned primarily for the welfare of the baby as well as the patient, will be less accurate determiners of the mother's period of actual disability than they are in cases of illness and injury where they are concerned solely with the patient's condition. This expectation has been verified by the *certified* claims received to date, as well as by the experience of other states.

Appellees also assert that because the UIC is based upon a "pooled risk" system[31] the State cannot exclude particular conditions because they constitute a substantially greater risk than others. Of course, all insurance is based on the pooling of some risks and the exclusion of others. For example, home owner insurance plans may pool the risks on brick and frame house and yet, in some areas, exclude damage to any houses by flood, or exclude coverage of uniquely expensive items like jewelry and art work; and automobile insurance plans may include large and small cars, but exclude damage or injury incident to a demolition derby. Appellees make no mention of another major risk which is also excluded from the UIC on the basis of cost: the short term disability.[32] Clearly, nothing in the Consti-

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31. Appellees have quite inaccurately described the "pooled risk" concept. Appellee's Brief at 12. Appellees quote from the Final Report of the California Assembly's Joint Committee on Unemployment Compensation Disability Insurance (1966), which report, at p. 27, defines a pooled risk fund: "a monopolistic system, with no room . . . for either private insurance companies or self insurance." The same report acknowledges that California has never been a completely pooled fund since it allows both private insurance and self insurance. California's tolerance of competition led to serious problems in prior years. Private insurance carriers wrote disability insurance for employers whose work force was primarily young and male, and whose disability rate is lowest of any group. While desirable risks were being privately insured, the adverse risks remained in the state fund and the high claims level virtually depleted the state fund's reserves. The State's response took the form of a regulation which required private insurance carriers to have not less than 20% women in any insured group. (Cal.Admin.Code, Title 22, section 3254(h)-1). Viewed in this perspective, the Joint Interim Committee's discussion concerning pooled risks demonstrates *Appellant's* contention: the State legislature has continually played watchdog to the financial solvency of the disability insurance fund and has always insisted on actuarial soundness. Moreover, it has, from the very beginning, wrestled with the problem of the high cost of insuring women.

32. Basic benefits under the UIC, absent hospitalization, begin with the eighth day of disability. A shorter waiting period for disability benefits is among the most costly of benefits. *See* Sinai, N., DISABILITY INSURANCE IN CALIFORNIA. (U. Mich. School of Pub. Health, 1965) at 23.

tution or in logic prohibits a state which has pooled certain risks from excluding other high risk conditions which are incompatible with the very purpose of its program.

Appellees further contend that the coverage of "unemployed workers",[33] older workers who have a lower rate of return to the work force,[34] and the structuring of benefits to the advantage of lower wage earners,[35] are all inconsistent with the exclusion of benefits for normal pregnancy.

Thus, Appellees read the Constitution as not permitting a state to (1) utilize a pooled risk system and exclude pregnancy, (2) cover the unemployed and parttime worker and exclude pregnancy, (3) extend benefits to lower-paid

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33. Appellee's Brief at 14. Appellees are entirely wrong in stating that the UIC does not require that a recipient of benefits intend to return to work. Proof that one continues to be in the labor market is required, under Title 22, Cal. Admin. Code section 2601.1(r) which provides in part:

> "If an individual has been neither employed nor registered for work at a public employment office or other place approved by the director for more than three months immediately preceding the beginning of a period of disability, he is not eligible for benefits unless the department finds that the unemployment for which he claims benefits is due to a disability and is not due to his previous withdrawal from the labor market."

Benefits have consistently been denied to persons who could not show this continued connection. See, for example, the following decisions of the California Unemployment Insurance Appeals Board in which benefits were denied: No. D-147, to a student who had the necessary income credits but who had returned to school; No. D-465, to a carpenter on leave of absence to build his own house; No. DC-10, to a retired person; and D-362, to a part time cannery worker disabled during the off-season. Each of these denials was based upon withdrawal from the labor market.

34. Appellees' Brief at 17. It has been the experience of one employer that 90% of non-returnees following disability leave either died or became eligible for company pensions. "Only 0.57% of Illinois Bell's employees actually resigned from company service after absences presently covered by the sickness and accident disability program." Brief of AT&T as Amicus Curiae at 10a, n. 10. It is also likely that many of the "exhaustees" simply have not recovered from their disability though they have exhausted benefits.

35. This argument is difficult to appreciate since Appellees attribute the disproportionate benefits advantage of female workers to this feature of the plan. Appellees' Brief at 83.

workers and exclude pregnancy, (4) include "virtually any disability," including some which are voluntary or subject to planning, and exclude pregnancy, and (5) provide benefits for conditions unique to one sex or the other and exclude pregnancy. But the decisions of this Court make clear that the Constitution does not deny states the flexibility to deal with complex social problems.

Covering conditions concentrated among males or females or older or poorer workers, and not including conditions related to normal pregnancy, are just the type of policy decisions which the state *is* entitled to make. This Court has repeatedly recognized that a state has the discretion to determine the resources it will commit to social welfare programs and to make reasonable classifications to define the beneficiaries of such programs. *Jefferson v. Hackney*, 406 U.S. 535 (1972); *Dandridge v. Williams*, 397 U.S. 471 (1970). Just as this Court has held that a state may lawfully prefer the aged and infirm to families with dependent children in the distribution of welfare funds, *Jefferson v. Hackney, supra*, so the state may consciously prefer benefits for the old or the poor to the provision of maternity benefits for normal pregnancy.

Neither is it sufficient to point, as Appellees do, to alleged imperfections in the symmetry of the legislative program. As the Court noted in *Jefferson v. Hackney, supra*, at 546:

> [I]n "the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." A legislature may address a problem "one step at a time," or even "select one phase of one field and apply a remedy there, neglecting the others." So long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket. [Citations omitted.]

IV.

THE COST OF PROVIDING DISABILITY BENEFITS FOR NORMAL PREGNANCY IS IMMENSE: PROVIDING THEM WOULD RESULT IN A SUBSTANTIAL DISADVANTAGE TO MALE WORKERS AND WOULD BANKRUPT THE FUND AS PRESENTLY CONSTITUTED

A. Cost of Pregnancy Coverage

Appellees offered no evidence on the cost of providing disability benefits for normal pregnancy in the court below. In this Court, Appellees for the first time take issue with the estimates made by the State of California. However, their criticism of the State's projections is based solely upon speculation and opinion, and upon the unwarranted assumption that claims for normal pregnancy would be limited to seven weeks.[36] The only credible evidence of the duration of pregnancy claims are the claims actually received to date by the State, which *average* 15 weeks' duration.

The experience of other states demonstrates that California's estimate of a 36%[37] increase in costs resulting from the inclusion of benefits for pregnancy is not inflated. In New Jersey, where claims are limited to eight weeks' duration, pregnancy claims accounted for between 49.09% and 57.51% of all benefits paid under that plan between 1969 and 1973.[38] Similarly, the coverage of pregnancy under the

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36. Appellee's Brief at 88. A policewoman in Chicago recently recovered $10,000 back pay and benefits for *12 months* when she was off from work due to childbirth, based on a claim for benefits accorded in connection with disability leaves. Chicago Daily News, March 14, 1974, at 1.

37. Appellant's estimate is that pregnancy benefits would cost $131 million, or a 36% cost increase. The revision upward from the $120.2 million reflects a higher benefit level and not, as erroneously indicated in Appellant's Brief at 31, a revised estimate of duration.

38. *See* Appendix B.

Hawaiian disability program has resulted in an increase in disability premiums for females from $4.00 per month to $8.76 per month.[39]

Appellees are also plainly wrong in asserting that the State's 36% cost increase estimate is inconsistent with the experience of private insurers.[40] The Health Insurance Association of America and the American Life Insurance Association, which represent some 500 life and health insurance companies, accounting for approximately 92% of the total life insurance and 90 percent of the total private health insurance programs in force in the United States, filed joint comments in response to a proposal by the Office of Federal Contract Compliance to require that federal contractors provide disability benefits for workers absent from work due to pregnancy.[41] In estimating the costs of such a requirement, the comments stated:

> Under a typical disability income plan with an average group of employees [assuming 38% to 40% are women], the addition of a disability income benefit to cover maternity absences would result in an additional cost to the employer of about 40 to 50 percent of his current costs for the plan.[42]

Moreover, Appellees misrepresent the data supplied to the Citizens Advisory Council on the Status of Women by Aetna Insurance and Casualty Company.[43] While these computations were based on a plan providing 26 weeks of possible benefits in the case of illness and injury, the 10%

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39. *See* Appendix C.

40. Appellees' Brief at 89.

41. 38 Fed. Reg. 35336-35338 (Dec. 27, 1973).

42. Joint HIAA-ALIA Comment at 9 (Feb. 11, 1974).

43. Appellees' Brief at 89 n. 130. *See* discussion in Brief of the American Telephone and Telegraph Company as Amicus Curiae, at 3-4.

increase in cost cited by Appellees was based on adding coverage for pregnancy *for no more than six weeks.*[44] Thus, the reasonableness of California's estimate of the cost of covering pregnancy is supported by the only evidence on the question in the record, the experience of other states with programs which provide coverage for pregnancy, as well as by the experience of the insurance industry with private disability programs.

Alternatively, Appellees contend that no matter how large the costs of providing benefits for normal pregnancy, the legislature is constitutionally barred from considering these expenses. It would be a most unusual constitutional doctrine which holds the cost of benefits irrelevant to a legislative consideration of a benefit program. There is certainly no warrant for such a holding in the decisions of the Court.

The substantial cost which will certainly result from providing benefits for normal pregnancy is dramatically different from the circumstances of the cases on which Appellees rely. Thus, in *Reed v. Reed*, 404 U.S. 71 (1971), the Court was properly unimpressed by the minimal added costs which might be occasioned by the need to hold hearings in the rare cases where applicants of the same degree of relationship sought to administer the estate of a decedent. Similarly, in *Frontiero v. Richardson*, 411 U.S. 677 (1973), the Court rejected a justification based on speculative cost savings resulting from administrative convenience.

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44. In addition, this calculation was based on a $60 per week benefit, excluded California's added cost for hospitalization benefits, and was based on a wide range of female participation in the employee group (31 to 40 percent). Citizens Advisory Council on the Status of Women, Information from Insurance Industry Relating to Coverage of Childbirth in Health Insurance and Temporary Disability Insurance, June 9, 1971, at 2. *See also* Appendix C.

Indeed, the plurality opinion noted, "The Government offers no concrete evidence, however, tending to support its view that such treatment in fact saves the Government any money." In *Memorial Hospital v. Maricopa County*, 42 U.S.L.W. 4277 (February 26, 1974) the Court found that the County's claim of cost savings as a result of a residence requirement imposed upon indigents seeking free hospitalization "may well be illusory." The Court noted that "[t]he lack of timely medical care could cause a patient's condition to deteriorate to a point where more expensive emergency hospitalization (for which no durational residency requirement applies) is needed." 42 U.S.L.W. at 4282.

By contrast, where the cost implications of a decision are clear, it is an appropriate subject for legislative consideration. *United States v. Kras*, 409 U.S. 434 (1973). This is especially true "in the area of economics and social welfare." *Kras, supra*, at 446; *see, Dandridge v. Williams, supra; Jefferson v. Hackney, supra.*

B. Impact of Pregnancy Coverage on Male and Female Share of Benefits

Contrary to Appellees' assertions,[45] it is clear that the coverage of normal pregnancy is more costly than any other disability or group of related disabilities presently covered by the program. This is manifest from the experience of the New Jersey program, where approximately half of all benefits are devoted exclusively to pregnancy.[46] It is further demonstrated by the broadly based data[47] presented in the

45. Appellees' Brief at 90-91.

46. See Appendix B.

47. The data in this brief was based on the experience of 894,505 and 955,752 employees in the respective survey years, almost half of whom were women. Brief of the American Telephone & Telegraph Company as Amicus Curiae, at 5, nn. 9, 10.

amicus brief of the American Telephone and Telegraph Company. There, even assuming a pregnancy claim duration of only eight weeks, pregnancy would account for 21% of the total disability days compensated under a plan very similar in its terms to the UIC. This would be larger than the total disability days resulting from any of the seventeen categories of related disabilities—even when the disability days taken by men and women are combined.[48]

It is apparent that the inclusion of such a substantial benefit category which can only be utilized by women will have a substantial impact on the male and female share of benefits, further enlarging the existing female benefit advantage. As noted in the State's main brief,[49] women presently receive $1.27 in benefits for each dollar contributed to the fund, while men receive $.80 for each dollar of contribution. The addition of benefits for normal pregnancy, assuming no increase in contributions or decrease in benefits,[50] would increase the female benefit rate to $2.33 while the male rate would remain at $.80.

It requires an extraordinary conception of the equal protection requirements of the Constitution to command such a result. Indeed, unless the exclusion of normal pregnancy is continued, the benefit levels of men and women will become grossly disproportionate. Although California does not strictly limit benefits according to contributions, the continuation of the exclusion of pregnancy may be viewed

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48. *Id.* at 11.

49. *Id.* at 26.

50. Of course, one of these two steps would be necessary to prevent the bankruptcy of the fund. If contributions were increased, these estimates of benefits per dollar contribution would be reduced from $2.33 and $.80 for both men and women but the ratio would remain the same.

as an appropriate means of providing some semblance of parity of benefits between men and women.[51]

C. Impact of Pregnancy Coverage on the Nature of the Fund

The California disability program was created from a surplus 1% employee contribution to the State unemployment insurance program. This rate has been maintained consistently throughout the twenty-seven year history of the fund, except for a six-month period when a .1% increase was necessary to forestall insolvency.[52] It is clear that the coverage of normal pregnancy would require abandonment of this limitation on contributions. Moreover, the claims for retroactive payments[53] threaten the very existence of the fund.

Appellees represent only one of many classes and subclasses of individuals who present demands on the resources of the UIC. In resolving these competing claims, the legislature has repeatedly rejected proposals to extend the UIC benefits to normal pregnancy, and has instead concentrated increased resources on the general improvement of benefits available to all workers. However, Appellees now contend that to cure "sex discrimination" in a program providing substantial benefit advantages to women, the

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51. In considering a conscientious objector's claim of constitutional entitlement to education benefits provided for veterans, the Court in *Johnson v. Robinson, supra*, noted:

> By enacting legislation exempting conscientious objectors from the well-recognized and peculiar rigors of military service, Congress has bestowed relative benefits upon conscientious objectors by permitting them to perform their alternative service obligation as civilians. Thus, Congress' decision to grant educational benefits to military servicemen might arguably be viewed as an attempt to equalize the burdens of military service and civilian alternate service, rather than an effort by Congress to place a relative burden upon a conscientious objector's free exercise of religion. 42 U.S.L.W. at 4320 n. 19.

52. Appellant's Brief at 13 n. 10.

53. Appellees' Brief at 6.

State must devote whatever resources are necessary to provide full benefits for normal pregnancy. Thus, 36% of UIC benefits would inure to approximately 5% of the work force,[54] all of whom would be women.

While all parties would probably agree that programs to provide benefits to sick and injured workers should be encouraged, acceptance of Appellees' argument will, at a minimum, discourage the establishment or expansion of such programs by other states[55] or by private employers.[56] Under their view, states could provide such benefits only if they pay a heavy constitutional qualifying fee by extending benefits to cover normal pregnancy. For the reasons set forth above, California contends that this position is constitutionally bankrupt.

There is another important aspect to Appellees' contention, since the provision of pregnancy benefits involves important questions of public policy. To what extent should

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54. Appellant's Brief at 35 n. 57 and accompanying text.

55. The deterrent effect upon other states of a requirement that pregnancy be treated as are other disabilities is illustrated by Wisconsin's recent experience. Under Wisconsin Laws of 1971, c. 125 § 270, the Wisconsin Group Insurance Board, a state agency, was directed to establish a disability income plan to provide benefits to state employees for "injury or illness." The Group Insurance Board adopted rules implementing the plan, including Wisc. Admin. Code C. Grp. 25.20 which provides that benefits shall not be payable for pregnancy "except for complications thereof." On January 2, 1974, the Wisconsin Department of Industry, Labor and Human Relations issued an order enjoining the exclusion of benefits for normal pregnancy. The Wisconsin Group Disability Board has filed a Petition for Judicial Review in the Circuit Court for Dane County, Wisconsin on the grounds urged by Appellant here, among others.

56. While studiously attempting to avoid any identification with private employers' programs, Appellees' Brief at 12, 17-18, Appellees nonetheless assert that "[R]esolution [of the present case] will almost certainly affect the interpretation of Title VII of the Civil Rights Act of 1964, Executive Order 11246, Appellees' Brief at 28.

the State support or encourage population growth? California submits that this is a question of such importance that it should be addressed directly and on its own merits. It would be manifestly improper to resolve the issue in the context of a claim for disability benefits, where the relevant considerations cannot be presented to this Court.

Dated March 19, 1974.

Respectfully submitted,

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Appendix A

HUMAN RESOURCES DEVELOPMENT DEPARTMENT

STATE OF CALIFORNIA

971 Claim Rate of the State Plan: Number of Claims iled Per Thousand Covered Workers, by Annual Earnngs, Sex, and Age.

	Age in Report Year 1971			
	Under 40	40-49	50 and Over	All Ages
l earnings intervals	47.0	96.3	123.1	69.5
Men	42.5	78.8	118.9	65.0
Women	53.8	124.5	130.0	81.4
nder $8,500	45.0	105.1	120.9	65.4
Men	38.8	81.8	113.3	56.8
Women	52.5	123.7	128.3	79.0
,000-9,999	70.7	110.3	162.3	103.7
Men	69.5	108.3	171.3	104.6
Women	76.3	116.3	132.2	104.0
,000 and over	43.9	67.8	106.9	68.5
Men	42.8	65.6	106.5	67.8
Women	63.3	103.1	111.9	90.8

Appendix B

Ronald M. Heymann
Commissioner

Frank E. Mishell
Director

STATE OF NEW JERSEY
DEPARTMENT OF LABOR AND INDUSTRY
DIVISION OF UNEMPLOYMENT AND DISABILITY INSURANCE
Labor and Industry Building
Trenton, New Jersey 08625

Address Reply to Writer
For Telephone Contact, Call
609-292-2700

March 19, 1974

Ms. Joanne Condas
Deputy Attorney General
Room 6000 State Building
San Francisco, California 94102

Dear Ms. Condas:

In response to your request enclosed you will find a copy of a monthly report prepared for me by the disability during unemployment activity of New Jersey's temporary disability insurance service. These disbursements represent a payment of benefits from the State Disability Benefits Fund that are not charged back to individual employers.

In order to derive a truer evaluation of the cost of pregnancy benefits these figures should be extrapolated by an increase of 20%. This 20% would represent the cost of payment for pregnancy purposes made under the State plan, and these costs are charged back to the individual employers.

A further cost to the taxpayer is the cost of pregnancy benefits paid under approved private plans. As you probably realize New Jersey copied California to some extent

in permitting employers to establish private plans for the payment of temporary disability benefits in lieu of the State plan. We estimate that the cost of these pregnancy benefits to the private plan sector would be approximately 29% more than the benefits paid by the disability during unemployment figures given herewith.

The disbursements of public moneys under the unemployment and disability laws in New Jersey are a matter of public record and available to any interested party who may properly request same. The figures given to you are included in this category.

Very truly yours,
/s/ B. N. Sheff
B. N. Sheff
Chief of Private Plan
Disability Benefits

BNS:lrf
Enclosure

To: B. N. Sheff, Chief of Private Plan
Disability Benefits

From: William I. Elder
Disability Claims Section

Subject: Below are Disability Figures for Period Beginning July 1, 1969 and Ending January 31, 1974

	No. of Preg. Claims Rec'd.	All Other Disab. Claims	Grand Total of Claims	TOT. CLAIMS DISB. Proc.	Ret. SP	Pregnancy Benefits Paid	Ben. Pd. Other Than Preg.	Grand Tot. Ben. Paid	No. of Ben. Wks. Pd.-Preg.	Tot. No. Indiv. Preg. Awards
7/1/69-6/30/70	14,078	12,864	26,942	24,650	1579	$5,024,684	$3,711,948	$ 8,736,632	93,658	12,349
7/1/70-6/30/71	15,548	15,221	30,769	29,828	1429	6,130,088	5,352,147	11,482,235	108,789	14,744
7/1/71-6/30/72	14,182	15,857	30,039	28,687	1140	5,887,589	5,990,126	11,877,715	98,709	13,163
7/1/72-6/30/73	11,925	14,324	26,249	24,974	1130	5,072,636	5,260,378	10,333,014	81,711	10,860
1974										
January	1,041	1,240	2,281	2,128	78	457,739	482,499	940,238	7,012	875

Appendix C

The Equitable Life Assurance Society of the United States [Letterhead]

LETTER "A"
95,000 POLICY SERIES

TO: OUR HAWAII TEMPORARY DISABILITY POLICYHOLDERS

RE: INCLUSION OF PREGNANCY AND TERMINATION OF PREGNANCY AS A DISABILITY UNDER THE TEMPORARY DISABILITY INSURANCE LAW

We have been informed by the State of Hawaii, Department of Labor and Industrial Relations, that Section 392-3, Hawaii Revised Statutes, has been amended effective May 8, 1973 to include pregnancy and termination of pregnancy under the definition of "Disability" under the Hawaii Temporary Disability Insurance Law, when the attending physician certifies that an employee is totally disabled because of this condition.

It has been determined that as a result of this increase in claim liability, the premium rate applicable to females will be increased from $4.00 per female per month to $8.76 per female per month effective August 1, 1973. The premium rate for males will remain at $3.25 per male per month.

This increase, however, will not be put into effect during the current 60-day price "freeze" period. You will be informed regarding the implementation of the increase in the cost of this coverage when Phase IV procedures are established, which is expected shortly.

Your policy automatically provides for this change and no amendment is required.

Very truly yours,
/s/ J. M. TURNER
J. M. Turner
State Plans Manager